No. 83-599

Office-Supreme Court, U.S.
FILED
SEP 28 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

CAPITAL CITIES, MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC. t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners,

vs.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

RALPH E. KATES, III
GRIFFITH, APONICK & MUSTO
Attorneys of Record
for Petitioners
408 Wilkes-Barre Center
39 Public Square
Wilkes-Barre, Pennsylvania 18702
(717) 825-3495

(Continued on Reverse)

9225
Rapp Typesetting Inc. +NJ (201) 257-6850+NY (212) 840-9494+PA (215) 563-5587
MA (617) 542-1114+DC (202) 783-7288+USA (800) 221-0008

ROBERT MAURER
Attorney for Petitioner
Pennsylvania Association
of Broadcasters
407 North Front Street
Harrisburg, Pennsylvania 17101

JACK C. LANDAU
ROBERT S. BECKER
Attorneys for Petitioner
Reporters Committee for
Freedom of the Press
Suite 300
800 18th Street, N.W.
Washington, D.C. 20006
(202) 466-6313

LAWRENCE M. LUDWIG
HENKELMAN, KREDER,
O'CONNELL & BROOKS
Attorneys for Petitioner
NEP Communications, Inc.
200 Bank Towers
P.O. Box 956
Scranton, Pennsylvania 1850
(717) 346-7922

DONALD LUKE
ROGERS & WELLS
Attorneys for Petitioner
Associated Press
200 Park Avenue
New York, New York 10166
(212) 878-8225

QUESTION PRESENTED

Is it a violation of the First Amendment for a trial judge, in a criminal prosecution with a sequestered jury, to prohibit indefinitely:

a) the publication of identities of jurors obtained by the news media from public records;

b) the publication or broadcast of photographs, sketches, and/or film of jurors made outside the courtroom; and

c) to restrict public and press access to trial exhibits admitted into evidence.[1]

---

1. The parties to this action are: Capital Cities Media, Inc. t/d/b/a The Wilkes-Barre Times Leader and NEP Communications, Inc. t/d/b/a WNEP-TV News, The Associated Press, The Pennsylvania Association of Broadcasters, The Reporters Committee for Freedom of the Press and Patrick J. Toole, Jr., Judge of the Court of Common Pleas of Luzerne County.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Opinion and Orders Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement Of the Case	3
Reasons for Granting the Writ	10
I. Publication of Identities of Jurors	11
II. Photographs, Film, Videotape and Sketches of Jurors.	12
III. Access to Trial Exhibits	13
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Angelico v. Louisiana, 593 F. 2d 585 (5th Cir. 1979)	13

Contents

Page

Associated Press v. United States, ____ F. 2d ____, 9 Med. L. Rep. 1617 (9th Cir. 1983) 14

Capital Cities Media, Inc. et al v. Toole, No. A-1070 (Received July 2, 1983) 8

Capital Cities Media, Inc. et al v. Toole, 101 E.D. Misc. Dkt. 1983, Pennsylvania Supreme Court 7

Capital Cities Media, Inc. et al v. Toole, ____U.S.____ (July 13, 1983) 12

Commonwealth v. Banks, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, C.P. Luzerne County, Pennsylvania 5, 6, 7

Commonwealth v. Banks, ex rel. Capital Cities Media, Inc., et al., Nos. 2135, 2195 of 1983 .....9, 10

Gannett v. DePasquale, 443 U.S. 368 (1979) 4

Globe Newspapers v. Superior Court, ____U.S.____, 102 S. Ct. 2613 (June 23, 1982) 4, 11

KPNX Broadcasting Co. v. Arizona Sup. Ct., ____U.S.____, 74 L. Ed. 2d 498 (1982) 13

Miami Herald v. Tornillo, 418 U.S. 241 (1974) 13

Nebraska Press Association v. Stuart, 423 U.S. 1327 (1975) 11

Contents

Page

Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976) 4, 10, 11

Press-Enterprise Co. v. Superior Court, No. 82-556 (cert. granted, January 24, 1983).....3, 16

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).....4, 11, 14

United States v. Brooklier, ____F. 2d____ (9th Cir. 1982) 13

United States v. Carpentier, 526 F. Supp. 292 (E.D.N.Y. 1981) 14

United States v. CBS, 497 F. 2d 102 (5th Cir. 1974)..... 13

United States v. Dorfman, 8 Med. L. Rep. 2249 (N.D. Ill. 1982) 14

United States v. Gurney, 558 F. 2d 1202 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978) 15

Statutes Cited:

28 U.S.C. §1257(3)..... 2

Rules Cited:

Pennsylvania Rules of Criminal Procedure:

Rule 326 8

Rule 1111 9

Contents

Page

United States Constitution Cited:

First Amendment ..... i, 2, 10, 13, 14, 16

Sixth Amendment 2, 11

Fourteenth Amendment, Sec. 1 3

APPENDIX

Opinion and Order of Mr. Justice William J. Brennan, Jr. in *Capital Cities Media, Inc. et al, v. Toole,* ____U.S.____, 103 S. Ct. 3524 (1983) 1a

Order of the Pennsylvania Supreme Court in *Capital Cities Media, Inc., et al v. Toole,* (Unreported) July 30, 1983 ..... 8a

Orders of Judge Patrick J. Toole, Jr. in *Commonwealth of Pennsylvania v. Banks,* Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, Common Pleas of Luzerne County, Pennsylvania (Unreported) June 3 1983 ..... 9a

No.

In The

Supreme Court of the United States

October Term, 1983

CAPITAL CITIES, MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC. t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners,

vs.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

OPINION AND ORDERS BELOW

The opinion and order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, is reported at 103 S. Ct. 3524 (1983) and appears in the appendix to this petition (1a-7a).

The order of the Supreme Court of Pennsylvania, dated June 30, 1983, is not reported and appears in the appendix to this petition (8a).

The orders of respondent, Honorable Patrick J. Toole, Jr., dated June 3, 1983 are not reported and appear in the appendix to this petition (9a-14a).

JURISDICTION

The trial court orders were entered on June 3, 1983. The Pennsylvania Supreme Court order was entered on June 30, 1983. The opinion and order of Circuit Justice Brennan was entered on July 13, 1983. The petition for certiorari is filed within ninety (90) days of the Pennsylvania Supreme Court order. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At issue in this case is the constitutionality of a broad restraint against publication of information obtained by the news media at public *voir dire* proceedings in a mass murder trial, and the constitutionality of severe restrictions on daily news coverage of the trial. Several days after representatives of petitioners attended *voir dire* proceedings, the trial court issued its orders barring publication of the identities of the jurors; prohibiting publication of photographs, sketches and/or film of jurors obtained anywhere, including outside the courtroom; and severely restricting public and press access to trial exhibits. The trial judge has stated unequivocally his intent to pursue criminal contempt charges against petitioners unless prohibited from doing so by this Court.

The present issue is supplemental to the issues raised in *Press-Enterprise Co. v. Superior Court,* No. 82-556 (*cert. granted,* January 24, 1983).

The record before the Pennsylvania Supreme Court was through a verified petition containing the following pertinent facts:

1. Capital Cities Media, Inc. t/d/b/a *The Wilkes-Barre Times Leader* is a publisher of a newspaper of general circulation in northeast Pennsylvania ("*Times Leader*").

2. NEP Communications, Inc. t/d/b/a WNEP-TV News is a television news broadcaster in northeast Pennsylvania ("NEP").

3. The Associated Press ("AP") is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1350-member newspapers and its 3300-member broadcast stations throughout the United States and to other publishers throughout the world.

4. The Pennsylvania Association of Broadcasters is a trade association representing radio and television stations licensed for broadcasting in the Commonwealth of Pennsylvania.

5. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and the free flow of information to the public. The Reporters Committee, headquartered in Washington, D.C., has been involved in many significant recent media access cases, including *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976); *Gannett v. DePasquale*, 443 U.S. 368 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspapers v. Superior Court*, ____ U.S. ____, 102 S. Ct. 2613 (June 23, 1982).

6. On June 3, 1983 Patrick J. Toole, Jr., a judge of the Court of Common Pleas of Luzerne County, Pennsylvania issued orders, *sua sponte:*

> (a) prohibiting the news media from ever "in any way" publishing the identities of jurors even though their identities are matters of public record and were known to the news media prior to the issuance of the order (*see* appendix, 13a ¶2 and 10a ¶4);
>
> (b) absolutely precluding all sketches, photographs, film, or videotape of any juror, at any place, during their service in this case (*see* appendix, 14a ¶6);

(c) restricting news media access to trial exhibits in a manner that effectively barred publication of information admitted into evidence, even after the jury in the case was discharged (*see* appendix, 11a ¶¶11, 12).

7. The orders were issued as part of the trial in the case of *Commonwealth v. Banks,* Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, C.P., Luzerne County, Pennsylvania (the "*Banks*" case).

8. The *Banks* case was a murder trial arising out of the murder of 13 people and is a matter of local, state, and national interest.

9. The orders challenged by petitioners were issued without notice or a hearing, and without a determination on the record of the necessity for such orders or the availability of less drastic alternatives.

10. Defendant Banks, received a change of venire from Wilkes-Barre, Pennsylvania to Pittsburgh, Pennsylvania for jury selection.

11. The jury was sequestered from June 5, 1983 until the conclusion of the trial on June 22, 1983.

12. Testimony began on June 6, 1983 and the trial was concluded on June 22, 1983, with guilty verdicts and death sentences.

13. On June 6, 1983, a substantial number of photographs, film, and videotape was taken of the jurors outside of the Luzerne County Courthouse by representatives of numerous news gathering organizations, including petitioners.

14. On June 7, 1983, the *New York Times* published one such photograph, transmitted by AP, which Judge Toole believed was taken in violation of his orders.

15. Judge Toole warned members of the news media that violations of his orders would result in exclusion from the trial of the member of the media believed by Judge Toole to be in violation of his orders and the news organization on whose behalf that member was acting at the time. Violations of his orders would also be punishable by criminal contempt.

16. In addition, on or about June 9, 1983 Judge Toole, *sua sponte,* initiated an inquiry as to compliance/non-compliance with his June 3, 1983 orders. This inquiry consisted of calling individual news people into his chambers for questioning regarding the source of the photograph which appeared in the *New York Times* on June 7, 1983.

17. The questioning of individual news people was conducted outside the presence of counsel and without providing the individual news people with *Miranda* warnings.

18. Members of petitioner, *Times Leader,* were questioned by Judge Toole on or about June 10, 1983.

19. A representative of the Associated Press who was assigned to cover the trial of *Commonwealth v. Banks* was also questioned by Judge Toole regarding the photograph of jurors which was transmitted over the AP wire.

20. The representative of AP was informed by Judge Toole that AP would be precluded from further coverage of the trial if Judge Toole considered his orders to be violated in any way.

21. Judge Toole has stated his intention to turn over the results of his own inquiry to the district attorney for criminal investigation if not prevented from doing so by a higher court.

22. The representatives of the *Times Leader* and AP were precluded, pursuant to Judge Toole's orders, from inspecting documents, photos, tapes, and other items which were marked as exhibits at the trial of *Commonwealth v. Banks.*

23. Judge Toole's orders interfered with petitioners' First Amendment right to cover the news.

24. On June 13, 1983, counsel for petitioners conferred with Judge Toole in an effort to have him modify the offending portions of his orders, raising our constitutional concerns at that time. Our efforts were unsuccessful.

25. On June 13, 1983, after conferring with Judge Toole, petitioners filed with the Pennsylvania Supreme Court a verified "Application for Leave to File Original Process . . . and Application for Extraordinary Relief . . .", together with a verified complaint against Judge Toole seeking a writ of prohibition. *Capital Cities Media, Inc., et al. v. Toole,* No. 101 E.D. Misc. Dkt. 1983, Pennsylvania Supreme Court.

26. On the afternoon of Thursday, June 30, 1983, at approximately 3:30 P.M., counsel were informed by telephone from the office of the Prothonotary of the Pennsylvania Supreme Court that a one line per curium order was entered on the record in that case which stated:

"Application for Writ of Prohibition denied."

27. On the afternoon of Thursday, June 30, 1983, at approximately 3:45 P.M., counsel for petitioners was informed

by Judge Toole that Judge Toole would proceed with enforcement of his orders by criminal contempt unless prevented from doing so by your Court.

28. Against this background, applicants came before this Court and respectfully requested an immediate stay of the prior restraint orders of Judge Toole. *Capital Cities Media, Inc., et al. v. Toole,* No. A-1070 (Received July 2, 1983).

29. The application was entertained by the Honorable William J. Brennan, Jr. sitting as Circuit Justice. Circuit Justice Brennan issued an opinion and order on July 13, 1983 (*see* appendix to this petition 1a-5a), granting some of the relief requested, denying some of the relief as inappropriate for emergency action and referring petitioners back to the trial judge for access to the trial exhibits.[2]

---

2. While portions of respondent Toole's orders were not appropriate for emergency relief because the trial had been concluded, they remain viable for review by this Court. Respondent Toole asserted two provisions in the Pennsylvania Rules of Criminal Procedure as the foundation for his orders. Those two rules state, in pertinent part:

> "Rule 326. SPECIAL ORDERS GOVERNING WIDELY-PUBLICIZED OR SENSATIONAL CASES. In a widely publicized or sensational case, the Court, on Motion of either party or on its own Motion, may issue a special order governing such matters as extra judicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the Courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an Order. In such cases, it may be appropriate for the Court to consult with representatives of the news media concerning the issuance of such a special Order."

(Cont'd)

30. On July 22, 1983, petitioners applied to respondent trial judge for access. The trial judge refused to hear the motion. On August 9, 1983, the motion for access to trial exhibits was heard by another common pleas judge who granted access. That decision was appealed to the Pennsylvania Superior Court by counsel for defendant Banks and the district attorney. *Commonwealth v. Banks, ex rel. Capital Cities Media, Inc., et al.*, No. 2135 and No. 2195 of 1983. The Pennsylvania Superior Court affirmed the lower court's grant of access to trial exhibits by orders issued on August 29, 1983.[3]

(Cont'd)

> "Rule 1111. SEQUESTRATION OF TRIAL JURORS. (a) The Trial judge may, in his discretion, order sequestration of trial jurors in the interests of justice. (b) When sequestration is ordered, each juror, including any alternate, shall be sequestered from the time of acceptance as juror until discharged. (c) Nothing in subsection (b) shall prevent a trial judge from ordering sequestration, at any time during a trial when the interests of justice require."

3. Surprisingly, while the question of access to trial exhibits, which respondent refused to hear, was pending before the Pennsylvania Superior Court, respondent issued the following order, again, *sua sponte:*

> "AND NOW, this 15th day of August, 1983, at 10 o'clock a.m., more than seventy-five (75) days having elapsed since the jury, sequestered in the above matter, was selected and sworn and more than fifty (50) days having elapsed since said jury returned its verdicts in both the trial and sentencing proceeding, the Court is now satisfied that the privacy and security of said jurors designed to be protected and promoted by the Order of June 3, 1983, has been satisfactorily accomplished and, accordingly, that provision of the Order of June 3, 1983, providing that: '2. No person shall print or announce in any way the names or addresses of any juror.' is hereby vacated *effective this date.* By the Court, /s/ Patrick J. Toole, Jr., J." (emphasis added).

REASONS FOR GRANTING THE WRIT

The orders of the trial judge in this case constitute direct prior restraints on publication of information legally obtained by the news media. These orders are in direct violation of constitutional principles established by this Court.

This Court has declared that any prior restraint on expression "comes to this Court with a 'heavy presumption' against its constitutional validity." *(citations omitted) Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 558 (1976). Thus, before a prior restraint may issue the trial judge must assess:

> "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained, pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562.

In this instance, the respondent trial judge unequivocally violated these constitutional standards. After members of the news media had attended the *voir dire* proceedings, the trial judge issued the challenged orders. He issued these orders without notice to the press, without an opportunity for a hearing, and without any record establishing they were necessary.

Though the trial in the case of *Commonwealth v. Banks* is long over, the need for action by this Court remains. If respondent's orders are allowed to stand, then other constitutionally proscribed trial orders of like effect can be issued with impunity. Given the likelihood that future trials will conclude before similar orders can be reviewed by higher courts, this issue will continue to evade appellate review. First Amendment freedoms are fragile enough without subjecting them to a race to th:

appellate court between the opening and the closing of a criminal trial. For this reason, this Court often considers matters which are capable of repetition, yet which would otherwise evade review. *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327 (1975).

I. Publication of Identities of Jurors

Before a prior restraint can be imposed in this context, the trial judge must determine on the record that there is a danger of prejudice to the Sixth Amendment rights of the criminal defendant and that no alternative exists which would adequately protect those rights. *Nebraska Press Association, supra.* Particularly in criminal trials, restrictions on the press must be narrowly tailored to serve a compelling governmental interest. *Globe Newspaper Company v. Superior Court*, ____ U.S. ____, 102 S. Ct. 1613 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Further, any such restriction must be based on an individualized determination made before access is denied. *Globe Newspapers, supra.*

Here, the jury was selected from an area of Pennsylvania far removed from the scene of the crimes and it was sequestered immediately after it was empanelled. Thus, there was little danger that the jury would be prejudiced by trial coverage in the local media. There were no allegations that the defendant had committed these crimes in concert with others who remained at large. In addition, jurors were sheltered from the outside world by court officials. Therefore, any notion that jurors would be harassed by accomplices or friends of the defendant or unduly influenced by press coverage were purely speculative.

As Justice Brennan noted in granting an emergency stay of a portion of the trial judge's order:

> "Our precedents make clear, however, that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was 'narrowly tailored to serve that interest', if indeed any justification would suffice to sustain a permanent order." *Capital Cities Media, et al. v. Toole,* A-1070 (Brennan, Circuit Justice, July 13, 1983).

II. Photographs, Film, Videotape and Sketches of Jurors

Some of the information in possession of petitioners is the likenesses of the jurors. This information was obtained by members of the press and the public from personal observation. The personal observation was obtained at public judicial proceedings, in public hallways and on public thoroughfares.[4] Some of this observation was memoralized in the form of photographs, films, videotapes, or sketches.

However, before petitioners could publish this information, they were required by Judge Toole to secure his permission. In so doing, respondent established himself as editor, with the power

---

4. This case does not involve the right of a trial judge to control activities within the courtroom. Petitioners are not demanding here the right to photograph and sketch within the courtroom. Our objections to the trial court orders deal with the geographical totality of the ban imposed and the prohibition against sketching even from one's own memory. Petitioner, NEP, sought permission to sketch inside the courtroom from Judge Toole. That permission was granted with the restriction that no juror's face could appear in the sketches.

to determine what was or was not newsworthy.[5] As this Court has stated: "It has yet to be demonstrated how governmental regulation of this crucial (editorial) process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time," (*Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974). *See also, United States v. Brooklier*, ____ F. 2d ____ (9th Cir. 1982) (overturning restrictions on access to information revealed by prospective jurors in *voir dire*); *Angelico v. Louisiana*, 593 F. 2d 585 (5th Cir. 1979) (declaring restrictions on use of cameras in courthouse halls and outside entrances were too vague); *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974) (overturning ban on broadcast of sketches made in and outside a courtroom during a criminal trial).

III. Access to Trial Exhibits

First Amendment considerations also apply to access to that portion of the public record composed of trial exhibits. During

---

5. The trial judge appeared to base his decision upon language in Mr. Justice Rehnquist's response last year to an emergency request for a stay of an order restricting broadcast of sketches made by television artists present at a criminal trial:

> "I would think that of all conceivable reportorial messages that could be conveyed by reporters or artists watching such trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches." *KPNX Broadcasting Co. v. Arizona Sup. Ct.*, ____ U.S. ____, 74 L. Ed. 2d 498 (1982).

It is not clear from the *KPNX* decision that this personal observation was critical to Justice Rehnquist's decision not to stay the orders restricting use of sketches. Surely, some members of the news media believe the public should know the identities of jurors. In the instant case, AP ran a photo which UPI did not. The *N.Y. Times* printed a photo which other papers did not. Jurors' potential biases, prejudices and relationships to trial participants are matters of significant public concern, as they reflect directly upon the integrity of the justice system.

the course of this trial, petitioners were prohibited from seeing the trial exhibits or even from speaking with the official court stenographer. This prevented petitioners from securing such basic information as the correct spelling of witnesses' names or the correct number or identification of the numerous trial exhibits.[6]

If the First Amendment guarantee of access to criminal trials, as first recognized in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), is to have true vitality, then the public and press must be allowed to know the content of all evidence introduced at trial. Similarly, as the Ninth Circuit recently declared, having earlier recognized a First Amendment right to attend pretrial proceedings: "There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them." *Associated Press v. United States,* ____ F. 2d ____, 9 Med. L. Rep. 1617 (9th Cir. May 10, 1983) [*citing United States v. Brooklier,* 685 F. 2d 1162 (9th Cir. 1982)]. *See also, United States v. Dorfman,* 8 Med. L. Rep. 2249 (N.D. Ill. 1982) (ruling that the First Amendment right of access to wiretap materials cannot be denied absent a showing of compelling need); *United States v. Carpentier,* 526 F. Supp. 292 (E.D.N.Y. 1981) (denying on First Amendment grounds a government motion to seal ABSCAM audio tapes).

---

6. When one of petitioners' news people requested copies of the exhibits, he was informed by Judge Toole that a formal motion by counsel would be required. When counsel for petitioners had verbally requested copies of exhibits, Judge Toole requested a written motion be filed to identify which exhibits were sought. There were 263 exhibits identified at the trial. Because no one outside of the parties, the trial judge and the court stenographer had access to the exhibit list, petitioners' written motion to Judge Toole on July 22, 1983 included a request for a copy of the exhibit list. When this motion was presented to Judge Toole he refused to entertain it and referred petitioners to the motions judge, who referred petitioners to the court administrator, who referred petitioners to the president judge, who set the matter for hearing before the miscellaneous court judge two weeks later. The exhibit list was not made available to petitioners until August 31, 1983, more than two (2) months after the conclusion of the trial.

Through his order, respondent sought to hold public information under his control, enabling him to disseminate it to those news organizations of his liking or at a time of his choosing. Nothing in our constitutional history supports such a tyranny by the judiciary. Respondent has no authority to control what portions of the public record the press may examine and print. All exhibits admitted into evidence are "in the public domain" and should be available to the press and public. *United States v. Gurney*, 558 F. 2d 1202, 1210 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

CONCLUSION

From the time the first pamphlet was distributed by a disgruntled colonist condemning a decision of the mighty British Crown, free press rights have been the rapier of the powerless. While sometimes the confrontation occurs between parties of significant resources, it does, occasionally, involve local newspapers attempting to wrest information from an overzealous county judiciary. The cutting edge of the First Amendment has not grown dull from lack of use. It should not be blunted from striking against the stone of the courthouse.

The issue of a court's ability to close *voir dire* proceedings to the press and the public is presently before the Court for review in the *Press-Enterprise* case. We are asking the Court to expand that review to include the issues of the trial judge's ability to prohibit publication of information obtained during *voir dire,* to prohibit the photographing and sketching of jurors outside the environs of the courtroom, and to delay press access to trial exhibits until the trial judge determines it is convenient. As public interest in the judiciary grows, demands by the press for access to information expand. This has been met by increasing resistance at the trial stage through orders similar to those of Judge Toole. Continued resort to appellate courts should not be required to obtain First Amendment guarantees. Petitioners are hopeful that review by this Court will obviate this problem.

Therefore, it is respectfully prayed that this Court grant a writ of certiorari, reverse the decision below, and grant a hearing to consider the rights of the press and the public in this context.

Respectfully submitted,

RALPH E. KATES, III
Attorney for Petitioners

APPENDIX

OPINION AND ORDER OF MR. JUSTICE WILLIAM J. BRENNAN, JR. IN *CAPITAL CITIES MEDIA, INC., ET AL. V. TOOLE*, ___ U.S. ___, 103 S. CT. 3524 (1983)

SUPREME COURT OF THE UNITED STATES

No. A-1070

CAPITAL CITIES MEDIA, INC., ET AL. *v.* PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ON APPLICATION FOR STAY

[July 13, 1983]

JUSTICE BRENNAN, Circuit Justice.

This is an application for an immediate stay of several orders entered by the Court of Common Pleas of Luzerne County, Pennsylvania, in connection with a homicide trial in that court, *Commonwealth* v. *Banks*, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, that had attracted a great deal of public interest. The specific orders in question were entered by respondent Judge Toole on June 3, 1983, after selection of the trial jury but before its sequestration. In one order, respondent directed first that "[n]o person shall print or announce in any way the names or addresses of any juror," Order in Accordance with Pa. Rules Crim. Proc. 1111(c), June 3, 1983, ¶2 (hereinafter ¶2), and also that "[n]o person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings . . . ," *id.*, ¶6 (hereinafter ¶6). In a separate order, Judge Toole ordered that "[n]o one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of the Court," Order Pursuant to Pa. Rules Crim. Proc. 326, June 3, 1983,

¶11 (hereinafter ¶11). The application for a stay was first presented to me on June 18, 1983, but I held it pending action by the Supreme Court of Pennsylvania on a substantially identical application for summary relief. On June 21, the jury returned a guilty verdict in the *Banks* case and was discharged; on June 30, the Supreme Court of Pennsylvania denied summary relief. Applicants immediately reapplied to me for a stay. An initial response was received by telegram on July 7, with a more complete response submitted on July 13.

In recent years, several Justices have had occasion to explain the role of a Circuit Justice in precisely this context, when a trial court has enjoined the press and other media from publication of information in connection with a criminal trial. Caution is the refrain of any Justice acting as Circuit Justice, but we have recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints. It is clear that even a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect. When it appears that there is a significant possibility that this Court would grant plenary review and reverse the lower court's decision, at least in part, a stay may issue. *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1330 (1975) (BLACKMUN, Circuit Justice); *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, Circuit Justice). See also *Bonura* v. *CBS, Inc.*, —— U. S. —— (Jan. 16, 1983) (WHITE, Circuit Justice).

I address first the ¶2 provision, which on its face permanently restrains publication of the names or addresses of any juror. Counsel for respondent has informed the Clerk of this Court that this order remains in effect, and that publication at this time of the name of a juror would subject the publisher to the possibility of being held in contempt of court. This order was entered by the Court *sua sponte* and without a

hearing or a record; neither the prosecution nor defendant has expressed any interest in it. Compare *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979). The jury was selected at voir dire proceedings begun prior to the issuance of this order, from which the press and public were not excluded, and at which the names of the prospective jurors were not kept confidential. Compare *Press-Enterprise Co.* v. *Superior Court*, No. 82–556 (cert. granted Jan. 24, 1983).

It hardly requires repetition that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," and that the State "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) (*per curiam*). This Court has given plenary consideration to a number of state statutes and court orders issued thereunder restraining publication of information in connection with a criminal trial or restricting press access to a criminal trial for the purpose of preventing such publication. Just last Term, in *Globe Newspaper Co.* v. *Superior Court*, —— U. S. —— (June 23, 1982), we held that the First and Fourteenth Amendments prohibited enforcement of a rule barring press and public access to criminal sex-offense trials during the testimony of minor victims. We adopted a familiar standard: "Where, as in the present case, the State attempts . . . to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.*, at —— (slip op. 10); cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors. Cf. *Globe Newspaper*, —— U. S., at —— (slip op. 11); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 600 (1980) (Stewart, J., concurring in the judgment). Our prece-

dents make clear, however, that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was "narrowly tailored to serve that interest," if indeed any justification would suffice to sustain a permanent order. Based on these precedents, I must conclude that if the Supreme Court of Pennsylvania sustained this order on its merits, four Justices of this Court would vote to grant review, and there would be a substantial prospect of reversal.

Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged. Cf. *Gannett Co.* v. *DePasquale*, 443 U. S., at 400 (POWELL, J., concurring). As for the State's concern for the jurors' privacy, we have not permitted restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding in a criminal trial, *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308, 311–312 (1977) (*per curiam*); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 568 (1976), even for the obviously sympathetic purpose of protecting the privacy of rape victims, *Globe Newspaper*, —— U. S., at —— (slip op. 11–12); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491–496 (1975). See also *Smith* v. *Daily Mail*, 443 U. S., at 104: "If the information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here"—*i. e.*, protecting the privacy of an 11-year-old boy charged with a juvenile offense. In an extraordinary case such a restriction might be justified, but the justifications must be addressed on a case-by-case basis, with all interested parties given the opportunity to participate, and less restrictive alternatives must be adopted if feasible. *Globe Newspaper*, —— U. S., at ——, and n. 25 (slip op. 12); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 580–581 (1980) (opinion of THE CHIEF JUSTICE);

Landmark Communications, Inc. v. *Virginia*, 435 U. S. 829, 842–843 (1978). The ¶2 order was entered without a hearing, and without findings of fact that would justify it; respondent has suggested no concern specific to this case in support of his order. Accordingly, I grant applicant's request for a stay of the ¶2 provision.

It would be inappropriate for me to grant a stay of the ¶6 or ¶11 provisions. By its terms, the ¶6 provision applied only "during [the jurors'] service in these proceedings." Since the jury has been discharged, this particular provision can no longer have effect. It may be that such an order, although it had expired, could be still receive appellate review in this Court under the "capable of repetition, yet evading review" doctrine, see *Nebraska Press Assn.*, 427 U. S., at 546–547, but there is no prospect of immediate injury to applicants before they can seek review of the order, so their application for a stay must be denied. As for the ¶11 provision, restricting access to exhibits, applicants have neither identified the exhibits to which they seek access, nor have they indicated that they have sought a court order permitting them access. The application for a stay of the ¶11 provision is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

I shall issue an order accordingly.

Order

SUPREME COURT OF THE UNITED STATES

No. A-1070

CAPITAL CITIES MEDIA, INC., ET AL.,

Applicants,

v.

PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ORDER

UPON CONSIDERATION of counsel for the applicants and the response and reply thereto,

IT IS ORDERED that paragraph No. 2 of the order of the Court of Common Pleas of Luzerne County, Pennsylvania, Criminal Case Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524, entered in accordance with Pa. Rules Crim. Proc. 1111(c), June 3, 1983, restraining publication of the names and addresses of jurors, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari or jurisdictional statement. Should the petition for a writ of certiorari be denied or should the appeal be dismissed, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted or probable jurisdiction is noted or postponed, this stay shall continue in effect pending the issuance of the mandate of this Court.

THE APPLICATION FOR STAY is denied as to paragraph No. 6 of said order, which prohibits any person from sketching or photographing jurors during their service, because it appears

that the order is inoperative as to its own terms. The application for stay of paragraph No. 11 of the Order Pursuant to Pa. Rules Crim. Proc. 326, June 3, 1983, which restricts access to exhibits, is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of July, 1983

Clerk of the Supreme Court
of the United States
By Christopher W. Vasil
Deputy

ORDER OF THE PENNSYLVANIA SUPREME COURT IN *CAPITAL CITIES MEDIA, INC., ET AL. V. TOOLE,* (UNREPORTED) JULY 30, 1983

IN THE SUPREME COURT OF PENNSYLVANIA

No. 101 E.D. Misc. Dkt. 1983

Original Process

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS,

Applicants

v.

PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

PER CURIAM FILED: JUNE 30, 1983

Application for Writ of Prohibition denied.

ORDERS OF JUDGE PATRICK J. TOOLE, JR. IN *COMMONWEALTH OF PENNSYLVANIA V. BANKS*, CRIMINAL NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 OF 1982, COMMON PLEAS OF LUZERNE COUNTY, PENNSYLVANIA (UNREPORTED) JUNE 3, 1983

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY * CRIMINAL

NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

AND NOW this 3rd day of June, 1983, the undersigned, pursuant to Pa. R. Crim. P. 326, finds and concludes that the following rules and regulations are necessary to protect and promote the orderly administration of justice in this matter and it is therefore

ORDERED, DIRECTED AND DECREED:

1. That all unauthorized persons, including personnel from the news media and general public, are prohibited from being in and shall be excluded from the security areas outlined on the attached drawings whenever the defendant and/or jurors are being escorted to or from the elevator or the building.

2. No cameras, photographic, television, radio or sound equipment, including tape recorders will be permitted in or on any security area outlined on the attached drawings whenever the defendant and/or jurors are being escorted to or from the elevator or the building.

3. That the southwest entrance way to the basement of the Court House and the corridors and approaches to the elevator in the basement of the Court House, and all entrances and approaches to the assigned courtroom on the third floor of the Luzerne County Court House, will be clear at all times for free

access thereto by those using them in the course of their employment or those having business to transact therein.

4. No attempt shall be made by anyone to talk to, record or photograph, televise or videotape any juror or jurors at any time during their service in this case.

5. No person shall be permitted to in any way, directly or indirectly, interfere with, obstruct or impede the passage or transfer of the defendant in or out of the Court House during these proceedings.

6. All spectators to the proceedings shall be seated at least three (3) minutes prior to the scheduled beginning of any trial session. Once a trial session begins the Court Room doors shall be secured and no one will be permitted to enter the courtroom until an authorized recess. No one inside will be permitted to leave the courtroom during any session, except with permission of Court, or in case of an emergency, recess or adjournment.

7. At any recess or adjournment, and at any other time the jury is retiring from the courtroom or the defendant is being escorted therefrom, the spectators shall remain seated in the courtroom until the jury and/or the defendant have had ample time to withdraw and said spectators have been given permission to disburse.

8. A uniformed Deputy Sheriff, in addition to regular court personnel, shall be assigned to insure courtroom security and compliance with this Order during the entire trial.

9. An adequate number of court personnel shall be assigned during all trial proceedings for trial control in the public corridor of the third floor and/or basement of the Court House.

Order

10. The bar of the court within the rail is reserved for the defendant, counsel and court personnel. No one else will enter said area without prior authorization of the trial Judge.

11. No one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of Court.

12. The official Court reporter assigned to this proceeding shall not release or divulge the contents of her notes of the testimony or the evidence presented by any person, nor shall any transcript of these proceedings in this matter be released by the reporter to any person unless and until a copy of such transcript has been ordered by and delivered to and approved by the Court.

13. No sketches may be made in the courtroom during the course of this trial without prior authorization of the trial Judge.

14. All lawyers participating in this case, their assistants, office associates, staff members, investigators and employees under their supervision and control are prohibited from taking part in public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

15. All court employees, as well as employees of the Clerk of Courts, Prothonotary, County Sheriff, Coroner, police officials and other law enforcement officers, their associates, deputies, assistants, staff members and personnel under their supervision and control are prohibited from taking part in or giving public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

16. All witnesses and jurors are prohibited from taking part in or giving any public interviews and from making extra judicial statements about this case until such time as the jury is discharged.

Order

17. Nothing in this Order shall prohibit any witness from discussing any matter in connection with the case with any of the attorneys representing the defendant or the Commonwealth, or any representative of such attorneys.

BY THE COURT,

s/ Patrick J. Toole, Jr.

J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Albert Flora, Esq.
Court Administrator

Order

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY • CRIMINAL

NOS. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982

COMMONWEALTH OF PENNSYLVANIA

v.

GEORGE E. BANKS

AND NOW this 3rd day of June, 1983, the undersigned, in accordance with Pa. R. Crim. P. 1111(c),

ORDERS AND DIRECTS that the jurors selected and empanelled in the above captioned matter shall be sequestered from the time they depart from Pittsburgh, Allegheny County, on Sunday, June 5, 1983, until such time as the said jury is finally discharged. In addition, in order to protect and promote the privacy and security of the jurors and to assure compliance with this sequestration Order, IT IS FURTHER

ORDERED AND DIRECTED:

1. That no person shall in any way, directly or indirectly, interfere with, obstruct or impair the movement of the jury to or from the Court House.

2. No person shall print or announce in any way the names or addresses of any juror.

3. Security personnel shall be provided at the hotel in which the jury shall be sequestered on a 24 hour basis.

4. The jurors shall, from the time of their departure, be under the supervision and control of duly authorized Court personnel.

Order

5. No telephone calls may be made or received by any juror while sequestered without explicit authorization of the trial Judge.

6. No person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings except that jurors may, with Court authorization, take pictures of and with consenting fellow jurors.

BY THE COURT,

s/ Patrick J. Toole, Jr.

J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Albert Flora, Esq.
Court Administrator

Office - Supreme Court, U.S.
FILED
OCT 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-599

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners

v.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Howland W. Abramson, Esquire
Charles W. Johns, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102
(215) 496-4523
Legal Counsel to the Administrator of Pennsylvania Courts

Attorneys for Respondent, Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF FACTS	2
REASONS FOR DENYING THE WRIT	6
1. The matter is moot and there is, therefore, no cognizable case or controversy	6
2. This Honorable Court is presently without sufficient information to decide the matter of its jurisdiction over this case because the decision of the Supreme Court of Pennsylvania to deny the extraordinary supervisory remedy of a Writ of Prohibition may well have rested on adequate and independent state grounds	8
CONCLUSION	12

APPENDIX

Order of August 15, 1983 of the Court of Common Pleas of Luzerne County, Pennsylvania-Criminal.	A-1
Order of June 30, 1983 of the Supreme Court of Pennsylvania	A-2
Article from *The Times Leader*, Wilkes-Barre, Pennsylvania, issue of June 3, 1983	A-3
Certificate of Service	

TABLE OF CITATIONS

CASES — Page

Federal

Globe Newspapers Co. v. Superior Court, ____ U.S. ____, 102 S.Ct. 2613 (June 23, 1982) 7

Interstate Commerce Commission v. New York New Haven & Hartford Railroad Co., 287 U.S. 178 (1932) 9

Michigan v. Long, ____ U.S. ____, 51 U.S. Law Week 5231, decided July 6, 1983 ..... 8, 8-9, 10

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) 7, 7-8

Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1971), *on remand* 387 A.2d 425, 478 Pa. 484 (1978), *appeal dismissed* 443 U.S. 913 . 8, 10

U.S. Alkali Export Assn. v. U.S., 325 U.S. 196 (1945) 9

State

Borough of Akron v. Penna. Public Utility Commission, 310 A.2d 271, 453 Pa. 554 (1973) 11

Carpentertown Coal & Coke Co. v. Laird, 61 A.2d 426, 360 Pa. 94 (1948) 11

In Re Investigation of January 1974 Philadelphia County Grand Jury, 328 A.2d 485, 458 Pa. 586 (1974) 11

Petition of Dwyer, 406 A.2d 1355, 486 Pa. 585 (1979) 9

Pirillo v. Takiff, 341 A.2d 896, 462 Pa. 511 (1975), *appeal dismissed, cert. denied* 423 U.S. 1083 11

OTHER AUTHORITIES

Pennsylvania Rules of Appellate Procedure:

Chapter 13 (Interlocutory Appeals by Permission) 9

311(a)(4) (Interlocutory Appeals as of Right — Injunctions) 9

903 (Time for Appeal) 6

1311 (Interlocutory Appeals by Permission) .. 6

1732 (Application for Stay or Injunction Pending Appeal) 9

1923 (Statement in the Absence of Transcript) 9

1924 (Agreed Statement of Record) 9

Pennsylvania Rules of Criminal Procedure:

326 (Special Order Governing Widely Publicized or Sensational Cases) 7

1111 (Sequestration of Trial Jurors) 7

No. 83-599

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners

v.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

To the Chief Justice and Justices of the Supreme Court of the United States:

The Respondent, the Honorable Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania, respectfully requests that the Petition for Writ of Certiorari be denied, and offers as reasons therefor the following:

COUNTER-STATEMENT OF FACTS

This case began with the murder trial of George E. Banks for the slaying of 13 people, including five of his own children, over which the Honorable Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Pennsylvania, presided[1] (hereinafter referred to as the *Banks* case).

The *Banks* case has received widespread and extensive public attention at the local, state, and national levels from the occurrence of the offense to date.

During the jury-selection process, it became apparent to Judge Toole that the prospective jurors had fears concerning their selection and the disclosure of their identities. Before the completion of jury selection, Judge Toole orally advised each member of the media present at the *voir dire* examination in Allegheny County (a change of *venire* had been granted) that names and addresses of jurors actually selected were not to be printed; nor were any photographs or sketches to be made of such jurors. In effect, at that time, identities of the prospective jurors were a matter of public record; those of the jury were not.

All those members of the media present during the jury-selection process agreed to the restrictions and made no objections to Judge Toole.[2]

On June 3, 1983, several days after the *voir dire* proceedings, Judge Toole memoralized by way of court order pursuant to Pennsylvania Rule of Criminal Procedure 326 (Petitioner's Brief, p.8 n.2) the stipulations between the media members and the court, as follows:

---

1. *Commonwealth v. Banks*, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524, and 1982, Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania.

2. According to several Petitioners, they were represented by counsel in earlier proceedings in the *Banks* case (Application for Stay, etc., *Capital Cities Media, Inc. v. Toole*, U.S. Supreme Court, October Term 1982, No. A-1070).

> No attempt shall be made by anyone to talk to, record or photograph, televise or videotape any juror or jurors at any time during their service in this case.

(Petitioners' Appendix: 9a-14a):

> No person shall print or announce in any way the names or addresses of any juror.

(Petitioners' Appendix: 9a-14a).

Following the promulgation of the June 3 order pertaining to photographs of jurors, Judge Toole met with members of the News Media Association and, as a result, orally authorized and advised all local media members that they could photograph or televise the jury entering the courthouse on Monday morning, provided the point of view was from the rear so as not to reveal or permit one to ascertain the identity of the subjects.

In addition, Judge Toole, in Allegheny County, permitted sketches of all persons present during the selection, with the exception of prospective or selected jurors.

The Judge also advised all members of the media that courtroom sketches would be permitted of all participants, but that no sketch was to be made of the jurors which could in any way reveal their identity.

This photograph provision applied only "during [the jurors'] service in these proceedings" and since the jury has been discharged, the order is no longer in effect.

Following their discharge, a number of jurors agreed to public interviews and their names were published with their consent in a number of newspapers, and at least one newspaper did publish all the names and addresses without regard to such consent.

The name-and-address provision of the June 3 order was vacated on August 15, 1983 by Judge Toole in an order which stated his opinion that the jurors' rights to privacy and protection had been preserved and that the

passage of specific lengths of time from jury selection and the return of the verdicts rendered their further protection by the court unnecessary (Appendix: 1a).

The June 3 order contained a third provision which was prompted by the fact that at pretrial conference, Judge Toole was advised that there would be over 200 exhibits marked for use at trial. In addition, a few days before issuing the June 3 order, an incident involving an exhibit occurred in another courtroom, resulting in a mistrial during jury deliberations in a murder case. In that case, an exhibit which had not been admitted into trial (it had been admitted in a suppression hearing) made its way in some unknown manner to the jury room along with properly admitted exhibits. The error was observed while the court was responding to a question submitted by the jury during its deliberations. The mistrial and its cause were the subject of a critical editorial by Petitioner *Times Leader*. Said the *Times Leader*: "[T]he entire [court] system had better be fine-tuned to make sure a snafu like this doesn't happen again." (Appendix: 3a). It was to avert another bizarre development like that criticized by the editorial which prompted the order:

> No one, except attorneys of record, their agents, Court, witnesses and jurors may handle exhibits *except by Order of the Court*. [Emphasis supplied]

On July 22, 1983, Petitioners for the first time applied to Judge Toole for access to the trial exhibits, a stay of the exhibit provision having been denied on July 13, 1983 by Mr. Justice Brennan for the reason that Petitioners had not sought a court order permitting access nor identified exhibits to which they sought access (Petitioner's Appendix: 5a). On August 9, 1983, the Petitioners' motion for access was granted and the decision, upon appeal by the defendant, Banks, and the District Attorney, was affirmed. *Commonwealth v. Banks, ex rel.*

Capital Cities Media, Inc., et al., Superior Court of Pennsylvania, Nos. 2195, 2135 Philadelphia 1983.

On or about June 13, 1983, ten days after Judge Toole's order of June 3, several of the Petitioners applied for an extraordinary Writ of Prohibition to the Supreme Court of Pennsylvania, seeking the writ to be directed to Judge Toole prohibiting him from enforcing the three above-mentioned orders pertaining to exhibits, photographs, and names and addresses. Those several Petitioners who were plaintiffs below did not allege that Judge Toole lacked the jurisdiction to enter the June 3 orders, nor did they allege that there was no adequate remedy at law, both prerequisites for a Writ of Prohibition. Instead, they merely alleged the unconstitutionality of the orders.

At no time did Petitioners seek relief from the June 3 orders by way of petition to the trial judge who entered them, Respondent Judge Toole.

In an order filed June 30, 1983, the Supreme Court of Pennsylvania denied without opinion the application for a Writ of Prohibition (Petitioners' Appendix: 8a). It is from this denial that Petitioners seek this Court's Writ of Certiorari to the Supreme Court of Pennsylvania.

REASONS FOR DENYING THE WRIT

1. The matter is moot and there is, therefore, no cognizable case or controversy.

The June 3 order pertaining to photographs expired on its own terms after the jury was discharged, on June 22, 1983. The order pertaining to names and addresses was vacated by the trial judge, on August 15, 1983, and the Petitioners were granted access to trial exhibits under the applicable order by the trial court, on August 9, 1983.

Because none of the orders challenged are presently in effect, the Petitioners argue that there is a cognizable danger of recurrent violations of their rights which will elude review. Had Petitioners pursued their remedies at law outlined in footnote 5 of this brief, they would have had an opportunity to obtain a timely stay and state appellate review of the June 3 orders.

Several of the Petitioners knew days in advance of Judge Toole's intent to enter his closure orders and they had retained counsel at an even earlier time. They did nothing save agree to the restrictions as to photographs and names and addresses. It was not until ten days after the order of June 3 issued that several Petitioners applied for a Writ of Prohibition. And it was not until July 22 that Petitioners requested trial exhibits after Mr. Justice Brennan had ruled that a challenge to that order was not ripe until such time that a request was made and denied (Petitioners' Appendix: 5a).

That Petitioners sought but did not obtain a Writ of Prohibition is not evidence that the matter evades review, but only perhaps that Petitioners took a wrong road. When the writ was denied them on June 30, they still had three days to but did not file their notice of appeal. *See* Pennsylvania Rules of Appellate Procedure 903; 1311.

It is not an uncommon practice for attorneys to seek an immediate stay of an interlocutory court order pend-

ing its appeal when the effect of that order is to grant an injunction or when the effect is to change immutably the position of the party aggrieved. Pennsylvania has provided for these circumstances. Petitioners present this Court with what could perhaps best be described as a bootstrap argument based on their choice of timing and procedure.

Petitioners claim that Judge Toole's orders are capable of repetition because state defendant Banks has a pending appeal and may obtain a new trial. This argument, being tied as it is to Bank's success or failure, makes clear that such as the challenged orders are not routine in Pennsylvania, nor regularly issued by Judge Toole.

This case is noticeably distinguishable from *Globe Newspapers Co. v. Superior Court*, ____ U.S. ____, 102 S.Ct. 2613 (June 23, 1982), and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Globe Newspapers*, it was not simply a closure order under attack, but also a statute requiring such orders in certain cases. Since it could reasonably be assumed that the petitioning newspaper would someday be subjected to another order relying on the mandatory rule, this Honorable Court held that the controversy was not moot. *Id.* In the instant case, however, Petitioners have not attacked the validity of Rules 326 and 1111 of the Pennsylvania Rules of Criminal Procedure pursuant to which Judge Toole issued the orders in question. It is nothing short of remote that Petitioners will one day be subjected to a similar order by either Judge Toole or another Commonwealth judge in a case involving virtually identical facts and circumstances.

In addition, the case *sub judice* is equally distinguishable from *Nebraska Press Assn., supra.* In *Nebraska Press*, petitioners had brought an action against not only the judge who had issued a closure order, but against the State of Nebraska as well. Under review in that case was a decision on the merits by the Nebraska

Supreme Court authorizing state prosecutors to seek restrictive orders in appropriate cases.

In the instant matter, Petitioners have sought relief only against a single trial judge of the Court of Common Pleas of Luzerne County in an isolated and unusual case. Moreover, Petitioners have not claimed — and, indeed, could not claim — that either the Commonwealth of Pennsylvania or the Pennsylvania Supreme Court has as yet stamped its imprimatur on the challenged closure orders or their manner of issuance.

2. This Honorable Court is presently without sufficient information to decide the matter of its jurisdiction over this case because the decision of the Supreme Court of Pennsylvania to deny the extraordinary supervisory remedy of a Writ of Prohibition may well have rested on adequate and independent state grounds.

This Court will not assume that there are no adequate and independent state grounds when there is no state-court opinion and where it does not fairly appear that the state court rested its decision primarily on federal law. *Michigan v. Long*, ____ U.S. ____, 51 U.S. Law Week 5231, decided July 6, 1983. The lack of an opinion in this matter dictates that the matter be remanded for clarification. *See Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1971) (Rehnquist, J., dissenting).[3] The presumption[4] created by this Court in *Michigan v. Long, supra*, has, as a condition precedent to its

---

3. *On remand* 387 A.2d 425, 478 Pa. 484 (1978), *appeal dismissed* 443 U.S. 913.

4. "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, *and* when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so [emphasis supplied]." *Michigan v. Long*, ____ U.S. ____, 51 U.S. Law Week at 5234.

existence, a state court opinion. Even were it to be argued that the very lack of an opinion raises the *Michigan* presumption, such an argument must fail in this case for several reasons.

Firstly, Petitioners requested that a Writ of Certiorari be directed to the Supreme Court of Pennsylvania to review that tribunal's denial of an extraordinary Writ of Prohibition. It cannot be said that a mere denial of a Writ of Prohibition without opinion of necessity implicates federal law as the source of decisive authority.

"A Writ of Prohibition is not a proceeding between private litigants, but rather it is a vehicle by which a superior tribunal may restrain an inferior tribunal, over which it has superintendance, from exceeding its desegregated [sic] jurisdiction [citations omitted]." *Petition of Dwyer*, 406 A.2d 1355, 1363, 486 Pa. 585, 600 (1979). If the inferior tribunal has the jurisdiction to hear and decide the matter, then a Writ of Prohibition will not be granted for the correction of asserted error or abuse of discretion. *Interstate Commerce Commission v. New York New Haven & Hartford Railroad Co.*, 287 U.S. 178 (1932). It will not issue when there is another adequate and alternative remedy, either on appeal of the final judgment or by permissive interlocutory appeal through the appellate rules.[5] The writs may not be used as a substitute for the authorized appeal. *U.S. Alkali Export Assn. v. U.S.*, 325 U.S. 196, 203 (1945).

---

5. Petitioners could have but did not pursue state appellate review of the June 3 orders at law under Pennsylvania Rule of Appellate Procedure ("Pa. R.A.P.") 311 (a) (4) (Interlocutory Appeals as of Right—Injunctions) or under Pa.R.A.P. Chapter 13 (Interlocutory Appeals by Permission). Petitioners could have, at the same time, but did not seek to obtain a stay of the trial court's orders under Pa.R.A.P. 1732 (Application for Stay or Injunction Pending Appeal). With respect to an expedited transmission of the record, Petitioners had but did not avail themselves of the benefits of Pa.R.A.P. 1923 (Statement in the Absence of Transcript) and Pa.R.A.P. 1924 (Agreed Statement of Record).

Secondly, as this Honorable Court observed in *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. at 244, the U.S. Supreme Court regularly denies applications for extraordinary relief without typically expressing its opinion for doing so. As Justice Rehnquist observed in his dissent in *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. at 243, there is no reason to presume that the petition for a Writ of Prohibition was rejected because the Pennsylvania Supreme Court disagreed with the Petitioners' constitutional claims.

Thirdly, the Pennsylvania Supreme Court denied the Petitioners' application for a Writ of Prohibition on June 30, 1983 (Appendix: 2a). This Court decided *Michigan v. Long* on July 6, 1983. The Commonwealth of Pennsylvania therefore had no notice that an opinion containing a plain statement that the state supreme court's opinion rested on adequate and independent state grounds was required by this Court in its determination of its own jurisdiction. Nor was the state supreme court compelled to make such a plain statement by the knowledge that Petitioners would seek a Writ of Certiorari.

As was said by this Court in *Michigan v. Long, supra*, the approach (that of taking jurisdiction in the absence of a plain statement that the decision below rested on state grounds) obviates *in most instances* the need to examine state law or the need for clarification by state courts of their decisions. This Court was quick to note, however, that there may be certain circumstances in which clarification is necessary or desirable and that it would not be foreclosed (by the *Michigan* decision) from taking appropriate action. *Id. at* ___ U.S. ___, 51 U.S. Law Week at 5234 n.6

This case is an example of such a case, where clarification by the state court is both necessary *and* desirable. It cannot be overemphasized that Petitioners seek the reversal of the denial of a Writ of Prohibition, a remedy which requires the court granting it to depart from

its normal appellate function. In Pennsylvania, there must be a showing of extreme necessity, *Pirillo v. Takiff*, 341 A.2d 896, 462 Pa. 511 (1975), *appeal dismissed, cert. denied* 423 U.S. 1083. The writ is to be used with great care and forbearance. *In Re Investigation of January 1974 Philadelphia County Grand Jury*, 328 A.2d 485, 458 Pa. 586 (1974). *The purpose of the writ is not to pass on the rights of litigants, but to manage and control inferior courts to prevent them from usurping jurisdictions and powers which they do not constitutionally and legally possess. Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 360 Pa. 94 (1948). Moreover, *prohibition is*, in Pennsylvania, *a legal and not an equitable remedy. Borough of Akron v. Penna. Public Utility Commission*, 310 A.2d 271, 453 Pa. 554 (1973).

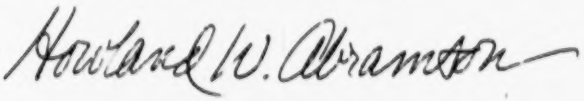
It would be inappropriate for this Court to presume that the Supreme Court of Pennsylvania passed upon the rights of the litigants using federal law merely because there is no opinion when such a presumption is clearly rebutted by a plain statement by the state supreme court that the purpose of the Writ of Prohibition is *not* to pass on the rights of the litigants. It would be equally inappropriate for this Court to entertain such a presumption in an area involving the supervision by the state supreme court over its trial courts, a matter totally unrelated to federal law.

Given these circumstances, it cannot be said that the state supreme court's action may be reasonably explained by requirements of federal law.

CONCLUSION

There being no case or controversy, the Respondent submits that this Honorable Court lacks subject-matter jurisdiction over this case.

Respectfully submitted,



Howland W. Abramson, Esquire
Charles W. Johns, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102
(215) 496-4523
Legal Counsel to the Administrator
of Pennsylvania Courts

Attorneys for Respondent, Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania

APPENDIX

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS of LUZERNE COUNTY * CRIMINAL
v.	:	
GEORGE E. BANKS	:	Nos. 1290, 1506, 1507, 1508, 1519, 1520, and 1524 of 1982

ORDER

AND NOW this 15th day of August, 1983, at 10 o'clock A.M., more than seventy-five (75) days having elapsed since the jury, sequestered in the above matter, was selected and sworn and more than fifty (50) days having elapsed since said jury returned its verdicts in both the trial and sentencing proceeding, the Court is now satisfied that the privacy and security of said jurors designed to be protected and promoted by the Order of June 3, 1983, has been satisfactorily accomplished and, accordingly, that provision of the Order of June 3, 1983, providing that:

> "2. No person shall print or announce in any way the names or addresses of any juror."

is hereby vacated effective this date.

BY THE COURT,

Patrick J. Toole Jr., J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Al Flora, Esq.

IN THE
SUPREME COURT OF PENNSYLVANIA

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEW, Applicants	:	No. 101 E.D. Misc. Dkt. 1983
v.	:	
PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY	:	Original Process

ORDER

PER CURIAM Filed: June 30, 1983

Application for Writ of Prohibition denied.

The Times Leader Friday, June 3, 1983.

Trial blunder causes hardship for everyone

Don't think the Luzerne County Court has become a laughingstock over the foulup in the Romanchick murder case. There is nothing funny when responsible officials can't keep evidence sorted out.

Extensive preparation and seven days of court proceedings went down the drain Wednesday when Judge Bernard Podcasy ruled a mistrial after determining that jurors were provided with photographs that he deemed were prejudicial. Those photographs linked the defendant, 29-year-old Tyrone Moore of Philadelphia, to an Oct. 2 bank robbery. Earlier, the judge had ruled them to be inadmissible evidence. If somebody had been efficient, those photographs would have been filed away someplace.

At this trial, Moore was being charged with criminal homicide, robbery, conspiracy, theft and reckless endangerment in connection with the Oct. 1 holdup of the Forty Fort Animal Hospital. At that time, 31-year-old Nicholas Romanchick of Plymouth Township, a customer at the clinic, was fatally shot.

Attorneys blamed the mix-up on court stenographer Carl Augustine, who reportedly had custody of the photographs. Mr. Augustine promptly denied the accusation, saying, "It wasn't my fault," while refusing to elaborate on whose fault it was.

We don't know whose fault it was. But it sure was somebody's. A living, breathing — although apparently unthinking — person with access to the photographs plainly messed things up. And that person deserves to be identified and appropriately disciplined. Furthermore, the entire system had better be fine-tuned to make sure a snafu like this doesn't happen again.

Perhaps the only saving grace is that the error was discovered before a verdict was reached, possibly avoid-

ing justification for an appeal several years from now. It would be an outrage if such an error were to cause a conviction to be overturned.

It's no wonder the public is in an uproar over crime in America, when so many cases result in bizarre developments like this one.

A staffer of the frustrated District Attorney's office said the prosecution would continue to seek a first-degree murder conviction in the case, which must be retried within 120 days. Meanwhile, a man's guilt or innocence remains undetermined, the victim's family will endure the prolonged agony of waiting, and a pile of tax money has been wasted.

Ray Blockus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Brief in Opposition was served on the following by mailing same, first class and postage prepaid, as follows:

Ralph E. Kates, III, Esquire
Griffith, Aponick & Musto
408 Wilkes-Barre Center
39 Public Square
Wilkes-Barre, PA 18702

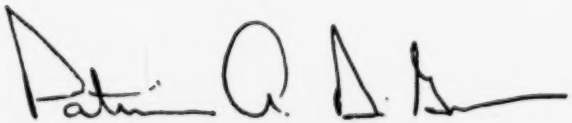
Lawrence M. Ludwig, Esquire
Henkelman, Kreder, O'Connell & Brooks
200 Bank Towers
P. O. Box 956
Scranton, PA 18501

Robert Maurer, Esquire
407 North Front Street
Harrisburg, PA 17101

Jack C. Landau, Esquire
Robert S. Becker, Esquire
Suite 300
800 18th Street,N.W.
Washington, DC 20006

Donald Luke, Esquire
Rogers & Wells
200 Park Avenue
New York, NY 10166

Samuel E. Klein, Esquire
Katherine Hatton, Esquire
Kohn, Savett, Marion & Graf
1214 I.V.B. Building
1700 Market Street
Philadelphia, PA 19103



Patricia A. DiGenova,
Production Coordinator
PACKARD PRESS
10th and Spring Garden Streets
Philadelphia, PA 19123
(215) 236-2000